

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

HYUNDAI AMERICA SHIPPING AGENCY, INC.

and

Case 28-CA-22892

SANDRA L. McCULLOUGH, an Individual

Eva Shih Herrera, Esq., and Paul R. Irving, Esq.,
Phoenix, AZ, for the General Counsel.
Thomas A. Lenz, Esq., Cerritos, CA, for the
Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, from June 29 to July 1, 2010. Sandra L. McCullough, an individual (the Charging Party or McCullough), filed an unfair labor practice charge in this case on February 5, 2010.¹ Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on March 31, 2010. The complaint alleges that Hyundai America Shipping Agency, Inc. (the Respondent, the Employer, or Hyundai) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observations of the demeanor of the witnesses,² I now make the following findings of fact and conclusions of law.

¹ The Respondent's answer admits the filing and service of the charge, as alleged in the complaint. All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

² The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 US 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

5 The complaint alleges, the answer admits, and I find that the Respondent, a California corporation, with an office and place of business located in Scottsdale, Arizona, herein called the Respondent's Phoenix facility, has been engaged in the business of shipping freight containers. Further, I find that during the 12-month period ending February 5, 2010, the Respondent, in conducting its business operations, performed services valued in excess of \$50,000 in States of the United States other than the State of Arizona.

 Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Dispute

20 It is the General Counsel's contention that the Respondent discharged its employee Sandra McCullough because she engaged in protected concerted activity. Allegedly that activity included complaining to the Employer about working conditions, specifically the sexual harassment of employee Kaitlin Hamilton by supervisor Justin Bozarth and regarding the way supervisors treated employees in general. It is also alleged that the Respondent's supervisors unlawfully interrogated McCullough about her protected concerted activity.

 The complaint further alleges that the Respondent has maintained an unlawful, overly-broad and discriminatory rule prohibiting employees from discussing matters under investigation by the Respondent, and threatening them with discipline if they did so. Additionally, it is alleged that the Respondent has maintained a number of unlawful provisions in its employee handbook that restrict the right of employees to engage in protected concerted activity, including those provisions captioned: Electronic Communications and Information Systems; Personnel Files; Employee Conduct; and certain enumerated infractions of the Employer's rules that may lead to termination. It is the position of the General Counsel that the Respondent unlawfully terminated the Charging Party not only because she engaged in protected concerted activity, but also because in engaging in that activity, she was in violation of the Respondent's unlawful rules.³

 The Respondent denies that its termination of McCullough was unlawful, or was in any way related to any concerted activity in which she may have engaged. According to the Respondent, McCullough was terminated because she engaged in deceptive business practices, was untruthful in her dealings with her supervisors, created dissension with fellow employees, disclosed confidential information, and was a substance abuser. The Respondent contends that it had good cause to fire McCullough. Further, the Respondent disputes the General Counsel's claim that the rules in its employee handbook or its employment practices were in any way restrictive of employee Section 7 rights.⁴

³ While the complaint does not explicitly allege that the enumerated rules are per se (on their face) unlawful, in response to a question from the undersigned, counsel for the General Counsel stated on the record that the General Counsel was taking that position.

⁴ Prior to the commencement of the hearing in this case, the Respondent filed a Motion to Strike Complaint Allegations, contending that the complaint paragraphs dealing with the

Continued

B. Background Facts and Resolution of Disputed Facts

The Respondent is engaged in the international shipping industry. Its import and export operations are headquartered in Irving, Texas. The Respondent transports cargo from all over the world to end destinations around the world including to and from the United States. Its customers include some of the largest international companies, such as Target, Wal-Mart, Samsung, Sony, and many others. To facilitate its operations, the Respondent has three regional customer service centers in the United States, including one in Phoenix, Arizona.⁵ The Phoenix facility is responsible for coordinating the import and export of goods for customers through ports on the Pacific coast. Specifically, it is responsible for customer service, export bookings, export documentation, export traffic, rebilling and collections, freight cashiering, accounting, inbound documentation, inbound custom service, and inbound cargo release for all customer cargo transiting the west coast ports.

Dianne Gunn is the Respondent's assistant vice president of national logistics, located at its headquarters in Texas. She is responsible for the operation of the Respondent's three regional customer service centers, including the Phoenix facility, as well as setting policy with regard to the movement of cargo. Brandi Andrews is the Respondent's assistant human resources manager, and also is located at the headquarters in Texas. Andrews is responsible for employee relations and consultations, including at the Phoenix facility. She reports directly to Charles Sartorius, human resources manager. Larry Marvin is the general manager of the Respondent's Phoenix facility, and is responsible for overseeing the entire operation of that facility, which employs approximately 63 employees.

Sandra McCullough began her employment at the Respondent's Phoenix facility on June 1, 2004, in its document department. Two years later she transferred to customer service in the import department, where she was employed until her termination on August 5, 2009.⁶ The import department at the Phoenix facility is comprised of smaller departments, including documentation, customer service, and cargo release. McCullough's job as a customer service representative consisted primarily of answering calls from customers and in assisting them in getting their cargo released. Her immediate supervisor was Linda Tomko, import customer service supervisor. Tomko supervised between six and eight customer service representatives.

employee handbook language and its employment practices should be stricken from the complaint as unrelated to the allegations of misconduct directed towards the Charging Party. (G.C. Ex. 1(f).) That motion having been denied, counsel for the Respondent, with leave from the undersigned, has renewed said motion in its post-hearing brief. However, I shall once again deny the motion for the reasons originally given. These collective matters are both factually and legally "closely related," as it is alleged by the General Counsel that the Respondent was discharged not only because she engaged in protected concerted activity, but also because in the course of engaging in that concerted activity, she was in violation of certain of the Respondent's employee handbook language and its employment practices. Such handbook language and employment practices are also alleged by the General Counsel to be unlawful. All these allegations certainly "relate back" to the timely filed charge in this case, and, thus, timeliness is not an issue. See *Redd-I, Inc.*, 209 NLRB 1115, 1118 (1988); *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006); *Seton Co.*, 332 NLRB 979, 985 (2000); *Nickles Baker of Indiana*, 296 NLRB 927 (1989). Further, although these rules have apparently been in effect for some time, as these rules are presumably still in effect, and allegedly constitute an ongoing violation of the Act, they are not time barred by Section 10(b).

⁵ Technically, the facility in question is physically located in Scottsdale, Arizona.

⁶ All dates are in 2009, unless otherwise indicated.

McCullough was, by any measure, very socially active at work. She had a number of coworker friends and kept in regular communication with them during the work day by sending emails, instant messages (IMs), and by verbal communication, and also through lunches and dinners after work. Further, it is undisputed that McCullough was concerned with certain working conditions and the way employees were treated by managers, and she had numerous discussions with coworkers about these matters. McCullough and fellow employees Debbie Ruscher, Colleen Bender, Bobbi Lewison, and Jolie Davis first discussed their concerns in February when they got together after work to discuss what they felt was the unfair discharge of a coworker, Marianne Culpepper. Other such discussions between McCullough and fellow employees followed.

In mid-May, McCullough called Charles Sartorius in human resources and said that she wanted to make a complaint about the working atmosphere in Phoenix being extremely hostile and intimidating, with management exhibiting favoritism among employees. She told Sartorius that as she feared retaliation, she wanted to remain anonymous. It does not appear that an investigation was launched, as the Respondent's human resources department will not commence an investigation unless a complaining party files a "formal complaint" in writing. This, the Charging Party declined to do.

On June 12, McCullough and several coworkers, including Ruscher, Brian Coberly, Kristen Cortelyou, Kaitlin Hamilton, and Brianne Flake, met at an Applebee's restaurant⁷ to discuss certain concerns about management. One of the matters discussed was Hamilton's allegation that Justin Bozarth, supervisor of the cargo release department, was sexually harassing her. The two had been romantically involved for some time. McCullough reported these concerns to Brandi Andrews in a telephone conversation on June 15, specifically about workplace hostility and the tension created by the romantic relationship between Bozarth and Hamilton. Shortly thereafter, Hamilton filed a formal complaint against Bozarth alleging sexual harassment. McCullough had helped Hamilton prepare that complaint.

The Charging Party contends that around this time she began to receive "retaliation" from management. About June 22 a series of messages were sent by the Phoenix facility managers to all the import department employees warning them that it was a violation of the Respondent's policy to use the company computers to send email and IMs for non-business related purposes. McCullough felt that these warnings may have issued with her specifically in mind, and, so, she sent an email message to Dan Feters, a supervisor, questioning him as to when it was appropriate to use email or IMs. (G.C. Ex. 15.) However, a copy of this email was sent by McCullough, she alleges inadvertently, to all the employees at the Phoenix facility. Feters considered McCullough's email to constitute insubordination, and she was given a verbal reprimand by Feters in the presence of Larry Marvin.⁸ Further, it is alleged by McCullough that during this conversation she was questioned as to whether she had been complaining to the human resources department. She responded that she had made complaints, along with other employees. She contends that the managers asked her for the names of those other employees who had complained and the subjects over which they had complained, which information she refused to furnish. McCullough did, however, allegedly volunteer that she considered the atmosphere at the Phoenix facility to constitute a "hostile" work environment.

⁷ This restaurant has also been referred to as Carlsbad Taverns.

⁸ It is significant to note that the complaint does not allege either Feters or Marvin as a statutory supervisor or agent, and the Respondent has made no such admission.

It is important to mention that the complaint does not allege this verbal reprimand to constitute an unlawful adverse employment action. While counsel for the General Counsel did not discuss the absence of such an allegation, I can only surmise that as the incident alleged occurred on June 22, 2009, and the unfair labor practice charge in this case was filed on February 5, 2010, more than six months later, there was a serious Section 10(b) issue. However, what is puzzling to the undersigned is the General Counsel's allegation in paragraph 4(k) of the complaint that during that same conversation, the Respondent's managers engaged in unlawful interrogation of the Charging Party. As both incidents occurred during the same conversation on June 22, more than six months before the charge was filed, I fail to understand the apparent inconsistency where one incident is alleged as a violation of the Act, and the other is not. Either way, both incidents would seem to be untimely under Section 10(b) of the Act.⁹

Immediately following her meeting with Marvin and Feters, McCullough called Brandi Andrews to complain. She followed up with an email to Andrews dated June 22 wherein she stated that she feared she would be terminated, and, therefore, could "no longer communicate regarding the work conditions" at the facility. Interestingly, in that same email she mentioned that the Respondent might "be in violation of the rights afforded to me under the Wagner Act," by the managers' interrogation of her. (G.C. Ex. 18.) Also, on June 22 she sent another email to Andrews. In this rather rambling message, McCullough mentions the sexual harassment of Hamilton by Bozarth, an "unstable and hostile" environment, "aggressive and intimidating behavior," verbal abuse, and discrimination. McCullough closes the message by saying that she "will assist [with an investigation] when I really do feel protected." (G.C. Ex. 12.) On the following day, June 23, McCullough sent Andrews still another email stating that she believes a "campaign has begun to terminate me..." Andrews immediately responded saying, "I'm concerned, what have you heard?" (Res. Ex. 10.)

McCullough did not feel that Andrews and human resources were doing enough, fast enough to investigate the complaints that she had raised, and, so, she sent a long, very detailed email message to Dianne Gunn, the assistant vice president for national logistics, dated June 29.¹⁰ (G.C. Ex. 6.) In this rather rambling message, the Charging Party raised a whole host of issues and complaints, including: demurrage, hostility and negativity by managers, male employees being favored, employees abusing the Respondent's policy on emails and IMs, verbal abuse of employees, firing employees for complaining about offensive instant messages, high turnover of temporary employees, and the generally hostile environment that existed in Phoenix. There are literally so many complaints listed in this long, single spaced document that it is hard to know when McCullough transitions from one subject to the next. However, clearly the thrust of the message was that the Phoenix facility was very poorly run, with a myriad of serious problems.

One of the primary issues raised by McCullough in her message to Gunn concerned a customer who was allegedly charged an excessive demurrage fee. As explained by Gunn when testifying, demurrage is the term used for the storage of cargo containers remaining at a facility longer than allowed by the port. There may be any number of reasons why a customer would

⁹ While paragraph 4(k) of the complaint, which I permitted the General Counsel to add as an amendment over the Respondent's objection, alleges interrogation in June and July 2009, with "more precise dates being unknown" to the General Counsel, from the record evidence it would appear that the only such alleged incident of unlawful interrogation occurred on June 22, at the time McCullough was also allegedly orally reprimanded for insubordination. (G.C. Ex. 1(g).)

¹⁰ This actually followed a first draft that was sent to Gunn by McCullough a number of hours earlier.

incur a demurrage fee, such as: not surrendering the proper documentation; not having received the appropriate customs clearances; freight charges owed; or just not having picked up the cargo container. It is the port authority that determines the demurrage charges, but the shipping entity decides how to bill its customer and for how much. Hyundai can waive all or part of the demurrage charges and just not bill its customer. In that event, Hyundai would pay the demurrage fee directly to the port, which would release the cargo upon being paid. In the alternative, Hyundai can direct the customer to pay the fee directly to the port, and, again, the cargo would be released. As I understand the process, the port authority simply wants to be paid the demurrage fee for storage, and will not release the cargo until it is paid. However, the port does not really care who pays the fee, only that it is paid. It is up to the shipper to decide how much if any demurrage will be paid by the customer.

Following her receipt of McCullough's letter of complaint, Gunn felt the situation was serious enough to warrant a trip to Phoenix, and on July 2 she arrived at the Phoenix facility and interviewed McCullough. Gunn testified that she spent about one hour talking with McCullough about the complaints that she had raised in her letter of June 29. However, according to Gunn, despite her many complaints, McCullough was not able to offer any suggestions as to how the situation might be improved. Gunn mentioned to McCullough that with her desire to see that conditions at the facility improved, McCullough should consider going into supervision. McCullough testified that she did not believe that Gunn was serious, but Gunn testified that her comment about supervision was genuine. Following their meeting, Gunn announced some "job reshuffling" at the Phoenix facility. (Res.19.) However, it does not appear that Gunn immediately addressed any of McCullough's complaints. In any event, subsequent events subsumed those complaints.

McCullough's relationships with fellow employees seemed to be mercurial. While she made many friends at work, a significant number of those friendships did not last. McCullough had a habit of making caustic comments to coworkers, which they found offensive. Further, she displayed the attitude that if fellow workers did not support some position that she advocated, that they were adversaries. Her relationships had a "soap opera" quality to them. McCullough's actions towards fellow employees, some of whom had been personal friends, began to affect her working relationship with those employees and the atmosphere generally at the Phoenix facility.

One such fellow employee with whom McCullough had a falling out was Julie Kersey. McCullough and Kersey had been friends. However, that all ended when on July 22 McCullough sent out an email to a number of employees claiming that she had seen Kersey on television partying in Las Vegas. In fact, Kersey was at home recuperating from an illness, and had so informed her supervisor. According to McCullough, she intended this email as simply a joke, which was why she closed the email with the note, "Love my JuJuRex," allegedly her friendly nickname for Kersey. (G.C. Ex. 10.)

Kersey certainly did not view this email as a friendly joke. In fact, she sent an email to her supervisor in which she asked to file a complaint against McCullough. She characterized McCullough's email as an "attack on [her] honesty and integrity" that may cause her fellow employees to question her work ethic. Kersey stated that she had done nothing to provoke McCullough's attack, which had "upset and hurt" her. She contended that McCullough's false claim had created a "work environment [that] has become very hostile." (Res. Ex. 11.) Later, even McCullough thought her own email a mistake, characterizing it in her testimony as that "stupid message." However, by that time the damage had been done.

Another incident that occurred at about the same time involved a newly appointed supervisor, Joanne Cassidy. According to McCullough, she and Cassidy had been friends, although Cassidy does not characterize their relationship as other than coworkers. Cassidy testified that in July while at work, she approached McCullough, who proceeded to say, "Wow, you have massive boobs." This was followed immediately by McCullough saying, "Please don't call HR. I can't believe I just said that." Cassidy did immediately call Brandi Andrews in human resources and complained about McCullough's comment. Sometime shortly thereafter, McCullough apologized to Cassidy, who then sent an email to Andrews informing her of McCullough's apology. (Res. Ex. 5.) McCullough did not deny the substance of the remark attributed to her, but merely claimed that it was intended as a complement as made in conjunction with a comment regarding how good Cassidy looked in a sweater she was wearing.

The most contentious relationship that McCullough had with coworkers and former friends involved Kristin Cortelyou and Kaitlin Hamilton. These women were much younger than McCullough and after hearing their testimony, I got the impression that initially McCullough acted as a mentor or "older sister" to the other two women. All agree that the three were friendly, with an especially close relationship between Cortelyou and McCullough. In fact, McCullough and Cortelyou were so friendly that in May, after Cortelyou lost an apartment mate, McCullough agreed to co-sign Cortelyou's apartment lease so that Cortelyou could remain in the apartment. Of course, this meant that McCullough, who did not live in the apartment, was legally responsible for the rent, if Cortelyou failed to make payments. At some point between May and July, Hamilton moved into the apartment, although she did not sign the lease.

There is no doubt that McCullough had a falling out with Cortelyou and Hamilton, although the precise reason is not all that clear to the undersigned. It was on June 12 at the Applebee's restaurant that McCullough assisted Hamilton in preparing her complaint accusing Justin Bozarth of sexual harassment. While Hamilton filed the complaint with human resources, both she and Cortelyou subsequently indicated to Brandi Andrews and Dianne Gunn that McCullough was unhappy with them, apparently for not pursuing the complaint with vigor. In any event, the relationship had soured. During July, in an effort to get back at her former friends, McCullough told the two women that Hamilton needed to vacate the apartment since McCullough now suddenly needed a place to live, and either had to move into the apartment or have her name removed from the lease. However, it appears that this sudden need was fallacious, and was intended only to upset Hamilton and Cortelyou. It had the desired effect, as both women were concerned that McCullough might appear at their apartment uninvited. That is exactly what happened, as in mid-July both McCullough and her boyfriend, despite not having a key, succeeded in convincing the apartment complex manager to allow McCullough into the apartment as she was still a co-signer on the lease. Once inside the apartment, McCullough called Hamilton and Cortelyou, who were both still at work, to tell them she was inside.

Upon learning that McCullough was in their apartment uninvited, Hamilton and Cortelyou were apparently too upset to work, and they informed the Respondent's Phoenix general manager, Lawrence Marvin, as to what had transpired. Marvin suggested they call the police about McCullough's unauthorized entry, and he allowed both women to leave work early so that they could return to their apartment. Upon their return to the complex, they found that McCullough and her boyfriend were still in the apartment, with McCullough demanding that they either give her a key or have her name removed from the lease. Subsequently, she did manage to convince the apartment complex manager to release her from the lease.

Thereafter, McCullough placed a number of calls to Cortelyou's cell phone, which were recorded in voice mail. While I sustained counsel for the General Counsel's objection to the admission of these messages into evidence, from the credible testimony of Hamilton and

Cortelyou there is little doubt that these messages were intended to further harass Cortelyou. As I noted, McCullough's conduct succeeded in upsetting both Hamilton and Cortelyou. They credibly testified that their work suffered as a result, and Cortelyou was especially distraught, developing stress and other related medical problems. When they testified, it appeared to me that both women were still genuinely fearful of McCullough. On the other hand, I did not believe that McCullough was truly concerned with having her name on the lease, and I am convinced that she was threatening to evict Hamilton simply to harass the two women. Even after all the time that had elapsed, her anger towards Hamilton and Cortelyou was palpable.

One way or another, the complaints about McCullough from Kersey, Cassidy, Hamilton, and Cortelyou all made their way to Gunn and Andrews. On July 23 and 24 both Gunn and Andrews were in Phoenix to investigate these collective complaints. But in addition, certain issues regarding McCullough's work performance had surfaced. Among others, whether McCullough had paid a customer's demurrage fees.

This issue arose when McCullough sought the refund of \$120 for a demurrage charge paid on behalf of a customer, Orient Express Corporation (OEC). Normally, the Respondent's managers decide whether to charge demurrage, how much demurrage to charge, and whether to waive demurrage. A customer service representative, such as McCullough, has no authority to set or waive demurrage charges. However, McCullough apparently felt that one of her customers had been charged an excess demurrage fee, which she was unsuccessful in getting management to waive. For some reason, she then decided to pay the demurrage fee herself. The only reason she ever offered for this action was, "To prove a point." But, she never explained in any kind of a coherent fashion just what point she was trying to prove. In any event, she wrote a personal check for \$120 and submitted it to Derek Vincent Moore, a supervisor in the Respondent's billing and collections department. She did ask Moore whether she was permitted to pay demurrage, and was told that anyone could do so. After writing her personal check, the customer's cargo was released. McCullough's check was processed and cashed. That likely would have been the end of the matter, except that McCullough then sought a refund of the fee on behalf of the customer. The issue then came to the attention of upper management.

Still another issue that had come to the attention of Gunn and Andrews was McCullough's habit of "blind copying" (BCC) parties on email correspondence with management that was considered confidential by management. When blind copying is used the sender of the email sends copies to persons who are not listed on the document as receiving the correspondence, and where the named recipient of the correspondence would be unaware that others were receiving the correspondence. It is obviously intended by the sender to provide certain unnamed persons with the correspondence without the named recipient's notice.

During her testimony, McCullough stated that, "There was [sic] a lot of emails and I did BCC on quite a few." When pressed during cross-examination about which emails, she responded, "The ones that had to do with the issues that we were having at work." Further, she named the following employees as being blind copied by her on correspondence with management: Bobbi Lewison, Colleen Bender, Debbie Rusher, Calvin Hardy, Kaitlan Hamilton, and Kristin Cortelyou. While Brandi Andrews testified that she learned from a complaining employee that McCullough had a practice of using blind copying in her correspondence with management, neither she nor Gunn were able to testify as to how many emails McCullough sent that were blind copied to others, what the content of those emails were, or to whom they were sent.

In any event, it is the Respondent's position that when McCullough complained to human resources about the conduct of managers, such as Justin Bozarth sexually harassing Kaitlan Hamilton, these were confidential matters, which should not have been disclosed to fellow employees through blind copying. The General Counsel argues that to the contrary,
 5 McCullough was engaged in protected concerted activity when she blind copied her fellow workers regarding complaints that she was making about management, and to prohibit such conduct constituted an unfair labor practice.

These were the issues that Andrews and Gunn were aware of regarding McCullough's
 10 alleged conduct when they went to Phoenix on July 23 and 24 to conduct an investigation. During that investigation, they interviewed a number of employees, including McCullough, Hamilton, Cortelyou, Cassidy, Kersey, Chian Ma, and various managers. Further, they learned certain information while interviewing some of those employees that ultimately related to their decision regarding McCullough's conduct.

15 During the course of their interview with McCullough, Gunn raised the issue of the \$120 demurrage payment. By that time Gunn and Andrews were aware that McCullough had personally paid the customer's demurrage fee, and Gunn had in her possession a company check made payable to McCullough as a refund of the fee. As the request for the refund made
 20 by McCullough did not specifically indicate to whom the refund was to go, Gunn specifically asked McCullough. According to the testimony of both Gunn and Andrews, McCullough initially indicated the refund was for the customer. However, McCullough testified that when directly confronted by the managers, she told them that the refund was for herself.

25 It is really not necessary to resolve this dispute. Whether McCullough directly lied to her managers or merely intentionally concealed the truth, it is clear that she did not want to disclose to Gunn and Andrews that she had paid the demurrage fee. She had initially so informed the Respondent's billings and collections supervisor, Derek Vincent Moore, at the time she wrote her personal check, but since that time had not further noted her payment. If nothing else, she
 30 was intentionally vague about where the refund was to go. She was obviously not anxious for Gunn and Andrews to know the refund was for her. So, I will give McCullough the benefit of the doubt and conclude that she did not directly lie to Gunn and say that the refund belonging to the customer, but that does not alter the fact that, at a minimum, her conduct towards her supervisors was deceptive.

35 In any event, Gunn handed the refund check to McCullough, which check was made payable to the Charging Party, signaling to her that the Respondent knew she had paid the demurrage fee. At that point further deception was fruitless. McCullough acknowledged that she had paid the fee. Gunn asked McCullough why she had seen fit to pay the customer's
 40 demurrage fee, to which McCullough replied, "To prove a point." However, the Respondent's managers were apparently as unclear as to what that meant as is the undersigned. Gunn informed McCullough that her actions were a violation of company policy.

45 While the Respondent does not have a specific policy prohibiting employees from paying a customer's demurrage fee, it would seem that such a policy was never previously necessary as the Respondent's managers testified that no employee had ever done so. Dunn displayed an attitude of surprise that McCullough, or any employee, would have done such a thing, and with displeasure that McCullough had attempted to conceal that fact from her. She testified that
 50 for an employee to pay a customer's demurrage fee would raise questions regarding that employee's relationship with the customer, specifically as to whether a conflict of interest existed that might compromise the employee's relationship with the Respondent. So far as Derek Vincent Moore's conduct was concerned, Dunn testified that the Respondent concluded

this manager had acted improperly in accepting McCullough's personal check for the customer's demurrage fee, and he was issued a written letter of reprimand. (Res. Ex. 15.)

Still another matter that arose during Gunn's and Andrews' visit to the Phoenix facility in late July was McCullough's alleged drug use. As early as July 10, Kaitlan Hamilton had reported to management that she had observed McCullough smoking marijuana in the parking garage while at work on June 16. Of course, it should be noted that by the middle of July Hamilton and McCullough were embroiled in their dispute over the apartment lease. Allegedly during their July 23 and 24 visit to the Phoenix facility, the managers were also told by employees Kristen Cortelyou, Chian Ma, and Brian Coberly that they had observed McCullough smoking marijuana. While the managers indicated that they were told the drug use was observed on the Respondent's property, the evidence does not support that assertion, with the exception of Hamilton's contentions. Cortelyou testified at the hearing that she never saw McCullough smoke marijuana during work hours, but only at McCullough's home. However, Cortelyou did say that McCullough had told her that she smoked marijuana before coming to work and while on her lunch break. Further, neither employee Chian Ma nor Brian Coberly was called by the Respondent to testify, and, accordingly, I will draw an adverse inference that had they been so called, neither would have testified that they observed McCullough using illegal drugs while at work. McCullough denied any use of marijuana while on the Respondent's property. When questioned about this alleged drug use, McCullough offered to take a drug test, which offer was declined by management. While not entirely clear to the undersigned, management apparently took the position that the observed use of marijuana was too distant in time to have made the use of drug testing dispositive of the issue.

The decision to terminate McCullough was made by Gunn. She testified that she made this decision after considering the results of her investigation, which allegedly disclosed multiple instances of misconduct on the part of McCullough. According to Gunn, she had never before encountered a situation with an employee where there was such a confluence of misconduct warranting termination. Before issuing the termination, Gunn consulted with her immediate supervisors, as well as with Andrews in human resources.

Gunn testified at length as to the specific reasons for her decision to terminate McCullough. Also, those reasons are set forth in detail in an internal document prepared by Gunn and signed off on by her immediate supervisors dated August 4 and entitled, "Termination of Sandra McCullough- Phoenix RCSC Inbound Customer Service Representative." (G.C. Ex. 2.) According to this document, there were 5 specific reasons for the termination.

Reason number one is, "Dishonesty regarding issuance of a personal check for an import shipment and stating customer is requesting a refund-When confronted with the issue, Ms. McCullough did not tell the truth about what occurred, until I prompted her with a copy of her personal check." The termination document indicates that McCullough's action was a direct violation of the Respondent's employee conduct and dishonesty policies.

The second reason listed is, "Blind carbon copying third parties on confidential emails concerning investigations-Ms. McCullough admitted doing this on several occasions, however, was not honest as to the parties actually sent the BCC of this confidential information-HMM IT Department discovered Ms. McCullough's emails were being sent to numerous addresses, including personal addresses." It is stated that this conduct violates the Respondent's employee conduct policy.

Reason number three is, "E-mail sent by Ms. McCullough regarding another employees absence-Harmful Gossip-On July 22, 2009, Ms. McCullough sent an email from her work

account to the entire Freight Cashier Department stating she had observed an employee on television, which was untrue, when that employee has called in ill portraying her in an unfavorable manner. This employee felt this would place her job in question and filed complaint.” While Gunn does not name the employee, clearly she is referring to Julie Kersey.

5 The document states that McCullough’s conduct violates the Respondent’s employee conduct policy.

The fourth listed reason is, “Complaints from several employees stating Ms. McCullough was creating a hostile work environment by encouraging them to go to HR with all complaints and exaggerate if necessary. When Ms. McCullough began to think that these employees were not following through on their complaints she began [sic] to leave threatening voice mails. Second issue regarding harassment is regarding a sexual comment made to an employee regarding the appearance of part of her body. The employee was offended and felt Ms. McCullough’s conduct was completely inappropriate in the workplace and filed a complaint.”

10 Although Gunn does not name the employees involved, she is obviously referring to Kaitlan Hamilton and Kristen Cortelyou as having received the threatening voice mails and complaining about McCullough’s having created a hostile work environment. Similarly, Joanne Cassidy is obviously the employee referenced as being offended when McCullough commented about the size of her breasts. Once again, the document alleges that McCullough’s “actions of threats, retaliation and harassment” violated the Respondent’s employee conduct policy.

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The fifth and final reason listed in the termination document is, “Reports of substance abuse during work hours. Several employees have alleged McCullough uses marijuana during work hours on a daily basis and often smokes the substance during meal period or work breaks near the office or in the parking structure. These employees have witnessed Ms. McCullough at work, most recently on June 15 on the top of the office parking structure during lunch. When confronted Ms. McCullough stated she last used marijuana in 2001 or sometime thereafter, [p]erhaps after a Hyundai holiday party. Ms. McCullough denies using the substance on the parking garage on June 15.” Apparently, Gunn was referring to employees Hamilton, Cortelyou,

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Chian Ma, and Coberly. However, as I noted earlier, at the hearing only Hamilton testified to actually seeing McCullough smoking marijuana on company property. In the document, Gunn alleges McCullough as being in violation of the Respondent’s alcohol or drug abuse policy.

Following the decision to terminate McCullough, Gunn flew to Phoenix and met with McCullough on August 5. Pamela Rosales, a manager at the Phoenix facility, was present with Gunn for the meeting, and Andrews participated by telephone. Gunn informed McCullough of the specific reasons for her termination, which, according to Gunn’s testimony, were those listed in the internal company termination document. Further, Gunn testified that each of the listed reasons played a factor in her decision to terminate McCullough, and those reasons had a cumulative effect on her decision making.

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C. Analysis and Conclusions

1. Handbook Provisions and Oral Rules

It is undisputed that at all material times, the Respondent has maintained an employee handbook, which is made available to the Phoenix facility employees. Certain of these handbook provisions as set forth in complaint paragraph 4(d) through 4(g) are alleged by the General Counsel to constitute per se (on its face) violations of Section 8(a)(1) of the Act.

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In general, the Board and the courts have held that if a rule specifically restricts Section 7 activities, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See

Waco, Inc., 273 NLRB 746, 748 (1984) (rule explicitly prohibiting employees from discussing wages with each other constitutes a clear restraint on Section 7 activity). In determining whether a rule or policy is on its face a violation of the Act, it is necessary to balance the employer's right to implement rules of conduct in order to maintain discipline with the right of employees to engage in Section 7 activity. Even in the absence of a specific prohibition of participation in Section 7 activities, a rule may still be unlawful if employees would reasonably understand the language to prohibit Section 7 Activity.¹¹ *Longs Drug Stores California, Inc.*, 347 NLRB 500, 500-01 (2006); *Lutheran Heritage*, 343 NLRB at 646. As the Board stated in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), "In determining whether the mere maintenance of rules... violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." See *NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn.10 (1945)).

Additionally, "in determining whether a challenged rule is unlawful, the Board must ... give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. Another rule of construction that the Board has developed is that even if the suspect rule could be considered ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

a. Electronic Communications and Information Systems

Counsel for the General Counsel indicated at the hearing that it is the General Counsel's position that the Respondent's rule prohibiting employee use of the Employer's Electronic Communications and Information Systems found in the Employer's Employee Handbook (G.C. Ex. 4, p. 6.) and as forth in paragraph 4(d) of the complaint is unlawful on its face. However, in her post-hearing brief, counsel for the General Counsel limits her legal challenge to the last line of that provision, which reads as follows: "Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons."

It does appear that in general, an employer has the right to restrict the use of its electronic communications systems for company purposes only. In *Register Guard*, 351 NLRB 1110 (2007), the Board held that employees do not have a statutory right to use the employer's e-mail system for Section 7 purposes. The Board said that "an employer may draw a line between charitable solicitations, between solicitations of a personal nature ... and solicitations for the commercial sale of a product ... and between business-related use and non-business related use." *Id.* at 1118. Therefore, an employer's policy prohibiting the use of a system for "non-job related" purposes would not by itself violate Section 8(a)(1) of the Act.

While the system in *Register Guard* involved the employer's computers, there are similar holdings for other types of office equipment and for many types of employer owned property. See *Mid-Mountain Foods*, 332 NLRB 229 (2000), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001) (no statutory right to use the television in employer's break room to show a prounion campaign

¹¹ The rule may also be invalid if it was promulgated in response to union activity or was applied to restrict Section 7 activity. *Longs Drug Stores California, Inc.*, 347 NLRB 500, 500-01 (2006); *Lutheran Heritage*, 343 NLRB at 647.

video); *Eaton Technologies*, 322 NLRB 848, 853 (1997) (no statutory right of employees or a union to use an employer's bulletin board); *Champion Int'l. Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) (an employer has a right to restrict use of company telephones to "business-related" conversations); *Health Co.*, 196 NLRB 134 (1972) (employer may bar a prounion employee from using the public address system to respond to antiunion broadcasts).

In the rule before me, the Respondent has restricted the use of its company property (the communications systems) for work purposes only. The Respondent's employees do not have a statutory right to use the Respondent's property for non-work purposes and the Respondent lawfully promulgated and maintained such a rule. However, counsel for the General Counsel has now limited her objection to the last sentence in the rule in question. That last sentence requires a somewhat different analysis.

The sentence in question reads, "Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons." I agree with counsel for the General Counsel that the prohibition in this sentence is written too broadly. As written it prohibits employees' disclosure of any information exchanged on company email, instant messages, and phone systems, which could reasonably include discussions of wage and salary information, disciplinary actions, performance evaluations, and other kinds of information that are of common concern among employees, and which they are entitled to know and to discuss with each other. The Respondent has failed to limit the prohibition on the disclosure of information to those matters that are truly "confidential," and which do not involve terms and conditions of employment. The Respondent's employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition. This prohibition is per se invalid as overly broad and ambiguous, and, as such, would reasonably chill employee Section 7 rights.

The final sentence of the provision is on its face unlawful as a violation of Section 8(a)(1) of the Act. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004) (finding a violation of the Act by maintenance of a rule stating: "You are not, under any circumstances permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any nonemployee without approval from the General Manager or the President"); *Iris USA, Inc.*, 336 NLRB 1013 (2001) (maintaining a handbook rule instructing employees to keep information about other employees strictly confidential was a violation). Accordingly, I find the last sentence of the Respondent's handbook provision as set forth in complaint paragraph 4(d) to constitute a violation of the Act.

b. Personnel Files

The General Counsel alleges that the provision in the Respondent's handbook entitled Personnel Files and set forth in complaint paragraph 4(e) is on its face a violation of the Act. Once again, it appears that it is the last sentence of this handbook provision that the General Counsel finds objectionable. The provision first describes the kind of information found in an employee's personnel file, and states that such personnel files are the Respondent's "confidential business information." Then, the last sentence in the provision reads, "Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge."

In her post-hearing brief, Counsel for the General Counsel argues that the rule is unlawful as it is written so broadly as to prohibit employees' disclosure of any information

contained in personnel files. The case law supports this conclusion. The Board has repeatedly held that “confidentiality” rules, which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment such as disciplinary actions, restrain and coerce employees in violation of Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated or ever enforced. See *Lutheran Heritage Village-Livonia*, *supra* at 646; *Double Eagle Hotel & Casino*, *supra* at 115; *Kinder-Care Learning*, 299 NLRB 1171, 1172 (1990); *Iris USA, Inc.*, *supra*; *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn.3, 291 (1999) (handbook provision prohibiting employees from disclosing “confidential information regarding ... fellow employees” was a violation).

In the rule before me, employees are prohibited from “[a]ny unauthorized disclosure of information from an employee’s personnel file” Such a broadly worded prohibition would reasonably include discussions of wages and salary information, disciplinary actions, performance evaluations, and other information that employees are entitled to know and to share with coworkers. Much of this information involves matters concerning the wages, hours, and working conditions of the Respondent’s employees, which information is precisely the type that may be shared by employees, provided to unions, or given to governmental agencies. Certainly, by expressly threatening “discipline, including discharge” for violating the prohibition, the Respondent is chilling employees in the exercise of their Section 7 rights. This language may reasonably interfere with, restrain, or coerce those employees in the exercise of their rights. Accordingly, I find the last sentence of the Respondent’s handbook provision as set forth in complaint paragraph 4(e) to constitute a violation of Section 8(a)(1) of the Act.¹²

c. Employee Conduct

As reflected in complaint paragraph 4(f), it is the General Counsel’s contention that the provision in the Respondent’s employee handbook entitled Employee Conduct is a per se violation of Section 8(a)(1) of Act. However, it now appears from counsel for the General Counsel’s brief that it is only the second half of that provision that is claimed to be unlawful. That language reads as follows: “Voice your complaints directly to your immediate superior or to Human Resources through our ‘open door’ policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all.”

In my view, the quoted language of the rule is overly broad and restricts employees from complaining about any work related matters, including wages, hours, or working conditions, to fellow employees or to interested third parties, such as unions or governmental agencies. It directs employees to bring their complaints only to immediate supervisors or to the human resources department. Implicit in this direction is the warning that if employees fail to follow the provision, they will be in violation of the Respondent’s rules and may be subject to discipline.

As counsel for the General Counsel noted in her post-hearing brief, it is a long, well-established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of

¹² Should the Respondent desire to prohibit the disclosure of “confidential business information” from personnel files, it is the responsibility of the Respondent to specifically define such information in a fashion that will clearly not include those matters that employees are entitled under the Act to discuss among themselves and with interested third parties. If the Respondent fails to do so, it may subject itself to further legal challenge.

employment. See *SNE Enterprises, Inc.*, 347 NLRB 472 (2006) (Board affirmed the administrative law judge's finding that the employer violated Section 8(a)(1) of the Act by prohibiting an employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that prohibition); See also *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990); *Guardsmark*, 344 NLRB 809 (2005).

While the Respondent's policy does not expressly say that an employee will be disciplined for making complaints outside the approved chain of command, the Respondent's rule goes beyond merely stating a preference, as shown by the directive, "Voice your complaints directly to your immediate supervisor or to Human Resources" This directive, by expressly stating to whom employees should voice complaints, implicitly prohibits employees from making complaints to other employees or entities. As the Board held in *Kinder-Care, Id.*, such a requirement "reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection."

Further, the Board has long held employee communication with third parties to be protected under Section 7. For example, the Board has found employee communications regarding their working conditions to be protected when directed to an employer's customers, *Greenwood Trucking*, 283 NLRB 789 (1987), its advertisers, *Sacramento Union*, 291 NLRB 540 (1988), enfd. 889 F.2d 210 (9th Cir. 1989), its parent company, *Oakes Machine Corp.*, 288 NLRB 456 (1988) enfd. 897 F.2d 84 (2d Cir. 1990); *Mitchell Manuals Inc.*, 280 NLRB 230, 232 fn. 7 (1986), a news reporter, *Auto Workers Local 980*, 280 NLRB 1378 (1986) enfd. 819 F.2d 1134 (3d Cir. 1987); *Roure Bertrand DuPont, Inc.*, 271 NLRB 443 (1984), and the public in general, *Cincinnati Suburban Press*, 289 NLRB 966 (1988). As the cases well establish, the Board has protected a vast array of employee communications with each other and with third parties regarding their working conditions, and, of course, the Respondent's employees enjoy these same protections.

That portion of the Respondent's Employee Conduct provision as set forth in complaint paragraph 4(f), which unlawfully restricts employees from discussing the conditions of their employment in the form of complaints violates those employees' Section 7 rights. Accordingly, I find that the second half of the provision that directs employees to "[v]oice your complaints directly to your immediate superior or to Human Resources" constitutes a violation of Section 8(a)(1) of the Act.

d. Employee Action Subject to Discipline

Counsel for the General Counsel argues in her post-hearing brief that certain provisions in the Respondent's employee handbook, which threaten disciplinary action for specific employee conduct, as set forth in complaint paragraph 4(g), constitute per se violations of the Act. The handbook provision lists 21 separate items that may be cause for disciplinary action. (G.C. Ex. 4, p. 11-12.) Of those items, only 3 are alleged by the General Counsel to be unlawful on their face, namely numbers 14, 16, and 21.

Number 14 reads as follows: "Threatening, intimidating, coercing, harassing or interfering with the work of fellow employees or indulging in harmful gossip." However, it appears from counsel for the General Counsel's post-hearing brief that it is specifically the phrase "harmful gossip" that is objectionable. Counsel argues that the phrase "harmful gossip" is ambiguous, and one person's harmful gossip may well be another person's concerted activities. I agree.

The Board found a violation of the Act in *Lafayette Park Hotel*, 326 NLRB 824 (1998), where a rule prohibited “[m]aking false, vicious, profane or malicious statements toward or concerning [the employer] or any of its employees.” In finding the violation, the Board reasoned that the rule failed to define the areas of permissible conduct in a manner clear to employees, which failure would cause employees to refrain from engaging in protected activity. *Id.* at 828. The Board found that an employee could reasonably construe the rule as prohibiting Section 7 activity and, therefore, the rule was unlawful. *Id.*

Similarly, the Board has found a rule prohibiting “negative conversations” about associates or managers violates the Act. See *Claremont Resort and Spa and Hotel*, 344 NLRB 832 (2005). In that case, the Board applied the three-part test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to find that “the rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.” *Claremont Resort*, 344 at 832.

In my view, the term “harmful gossip” is imprecise, ambiguous, and subject to different meanings, including a reasonable belief that it would include protected activity. However, the rest of the sentence, “threatening, intimidating, coercing, harassing or interfering with the work of fellow employees,” would, I believe, be read and interpreted by a reasonable employee merely as a code of conduct and decorum, rather than as a prohibition on Section 7 activities. It is the term “harmful gossip” that makes the sentence unlawful as restrictive of protected activities. Accordingly, I find that the use of the phrase “harmful gossip” in the Respondent’s handbook, as set forth in complaint paragraph 4(g) constitutes a violation of Section 8(a)(1) of the Act.

The second employee handbook rule (number 16) set forth in complaint paragraph 4(g), which counsel for the General Counsel alleges is unlawful on its face, is the prohibition against “[p]erforming activities other than Company work during working hours.” This rule is facially invalid as it is overly broad. It is well established by the Board that rules that prohibit union solicitation or activities on “company time” or during “working hours” are overly broad and presumptively invalid as they could reasonably be construed as prohibiting solicitation at any time, including an employee’s break times or other nonworking periods. *Moeller Aerospace Technology, Inc.*, 347 NLRB No. 76 *8 (2006). In that case, the Board held that the phrase “working hours” connotes periods from the beginning to the end of work shifts, periods that include the employees’ own time, such as lunch and break periods. *Id.* at fn.7.

Conversely, the Board has held that “rules using ‘working time’ are presumptively valid because the term signifies periods when employees are performing actual job duties, periods which do not include the employees’ own time such as lunch and break periods.” *Our Way, Inc.*, 268 NLRB 394, 395 (1983). However, in *Standard Motor Prods.*, 265 NLRB 482, 483 (1982), the Board allowed an overly broad rule, which prohibited “nonjob related activities during working hours” to be cured by an oral communication to employees that the rule did not apply to lunch periods. An employer can only overcome a facially invalid rule by showing that the rule was communicated to employees in such a way as to clearly convey an intent to permit solicitation during periods and in places where the employees are not actually working. *Moeller Aerospace Technology, Inc.*, *supra*.

In the case before me, the Respondent has made no such showing. While the rule in question does not define “working hours,” Brandi Andrews testified at the hearing that she understands the term to exclude employees’ breaks and lunch. However, no evidence was offered at the hearing that employees have the same understanding, or that the Respondent

made any attempt to communicate to employees that the rule was limited to periods during which employees are actually performing work. Accordingly, the rule in question is overly broad and presumptively invalid on its face because employees would reasonably believe their Section 7 activity was prohibited even during breaks and lunches. Therefore, I find rule number 16, as set forth in paragraph 4(g) of the complaint, to constitute a per se violation of Section 8(a)(1) of the Act.

The third employee handbook rule (number 21), set forth in complaint paragraph 4(g), which counsel for the General Counsel alleges is unlawful on its face, is the prohibition against “[i]nefficiency, lack of productivity or not meeting performance standards of the Company; exhibiting a negative attitude toward or losing interest in your work assignment.” However, it appears from counsel for the General Counsel’s post-hearing brief that it is specifically the phrase, “exhibiting a negative attitude toward or losing interest in your work assignment,” which is objectionable. I agree with counsel, as the phrase “negative attitude” is ambiguous, and while one employee may view the phrase as relating solely to work performance, another employee may view a negative attitude as relating to concerted activity.

The Board has held that a rule prohibiting “negative conversations” about associates or managers of a company violates the Act. *Claremont Resort & Spa & Hotel*, 344 NLRB 832 (2005). In so holding, the Board reasoned that the rule would be “reasonably construed by employees to bar them from discussing with their co-workers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.” *Id.* at 832.

The Respondent’s rule 21 is overly broad because a “negative attitude” is one that could reasonably be assumed by employees to prohibit an attitude that is in any way critical of the employer. As such, the rule would reasonably inhibit employees from discussing controversial topics at work, including the terms and conditions of their employment. Of course, it is well established that “[n]o restrictions may be placed on employees’ right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

In the matter before me, the Respondent has failed to define what constitutes a “negative attitude,” and in failing to do so, the rule would reasonably be construed to prohibit employees from discussing the terms and conditions of their employment, particularly if they had any complaints about those terms and conditions of employment. Employees should not have to guess as to whether something they wish to discuss regarding their employment may be construed by the Respondent to constitute a “negative attitude.” When employees are forced to act at their peril in making such a determination, they likely will be reluctant to engage in otherwise lawful concerted activity. Therefore, the language in question is likely to chill employee Section 7 activity. Accordingly, I find that the use of the phrase “exhibiting a negative attitude toward or losing interest in your work assignment” in rule number 21, as set forth in complaint paragraph 4(g), constitutes a per se violation of Section 8(a)(1) of the Act.

e. Oral Rules

It is alleged in complaint paragraphs 4(b) and (c) that the Respondent has maintained an overly broad and discriminatory rule prohibiting employees from discussing matters under investigation by the Respondent, and has threatening employees with discipline if they violate that rule. It is undisputed that one of the reasons leading to McCullough’s termination was the use of “blind copy” emails to alert coworkers to communication between McCullough and management regarding matters under investigation by the Respondent. While it is not entirely

certain exactly which emails were blind copied, it is clear that the Respondent was investigating and communicating with McCullough regarding matters involving possible sexual harassment, creation of a hostile work environment, and drug abuse. Further, it is also undisputed that as a matter of course, human resources personnel, such as Brandi Andrews, routinely cautioned employees orally not to disclose matters that were under investigation. The General Counsel alleges such conduct to constitute a violation of Section 8(a)(1) of the Act.

However, in his post-hearing brief, counsel for the Respondent argues that, to the contrary, the Respondent has legitimate business justifications in keeping investigations confidential. Those allegedly include the desire to protect the victim, witnesses, and accused harasser in the investigation; to preserve confidentiality consistent with the Equal Employment Opportunity Commission guidelines and state and federal courts; and to avoid potential liability from accused harassers in defamation and other causes of action.

In *Desert Palace, Inc., d/b/a Caesar's Palace*, 336 NLRB 271 (2001), the Board reversed an administrative law judge and found that the employer's need to maintain the confidentiality of an on-going drug investigation was a "substantial business justification" that justified the intrusion on its employees' exercise of Section 7 rights. The Board emphasized that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. Further, the Board agreed that the employer's rule prohibiting discussion of the on-going drug investigation adversely affected employees' exercise of the right. However, the Board still found the employer's rule lawful, and concluded that it could be enforced. The Board concluded that the interest of the employees in discussing the drug investigation was outweighed by the employer's legitimate and substantial business justification. In this case, the employer sought to impose the confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and testimony was not fabricated. According to the Board, the employer met its burden of demonstrating a legitimate and substantial business justification for its conduct. The Board cited *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3rd Cir. 1976), and held that the employer's action in maintaining and enforcing the confidentiality rule, or by discharging employees for breaching said rule, did not violate the Act.

The Board reached a different conclusion in *Phoenix Transit Systems*, 337 NLRB 510 (2002), finding in agreement with the administrative law judge that the employer violated the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. The Board held that the employer had failed to establish a legitimate and substantial justification of its rule. In this case, the events at issue occurred approximately one and a half years after the employer concluded its investigation of the alleged sexual harassment. The Board distinguished this remote time frame from the *Caesar's Palace* case where the enforcement of the confidentiality rule in question was more immediate, and was needed to prevent a cover-up, including to ensure that witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated.

In light of the *Phoenix Transit* and *Desert Palace* cases, it seems obvious that the Board is attempting to strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer, under certain circumstances, to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.

I am of the view that in the matter at hand, the Respondent has failed to meet its burden. It is undisputed that the Respondent's managers and human resource supervisors routinely instruct employees involved in investigations not to talk with other employees about the

substance of those investigations. Such admonitions are apparently given in every case, without any individual review to determine whether such confidentiality is truly necessary. Under the Board's balancing test, it is the Respondent's responsibility to first determine whether in any give investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up. Only if the Respondent determines that such a corruption of its investigation would likely occur without confidentiality is the Respondent then free to prohibit its employees from discussing these matters among themselves. There is no evidence that the Respondent conducts any such preliminary analysis. To the contrary, it seems that the Respondent merely routinely orders its employees not to talk about these matters with each other.

The Respondent has failed to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights. It has failed to meet its burden of proof. Accordingly, I conclude that the Respondent has unlawfully maintained an overly broad and discriminatory oral rule prohibiting employee from discussing matters under investigation and by implicitly threatening employees with discipline if they violate that rule. By such conduct, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(b), (c), and 5.

2. Alleged Interrogation

At the hearing, over counsel for the Respondent's objection, I permitted the General Counsel to amend the complaint to allege in paragraph 4(k) that in June and July 2009, on more precise dates being unknown to the General Counsel, the Respondent interrogated its employees about their concerted activity. (G.C. Ex. 1(g).) As I noted in the fact section of this decision, from the record evidence, the only incident which could conceivably constitute unlawful interrogation occurred on June 22, 2009, when McCullough was issued a verbal reprimand for insubordination by Phoenix facility manager Dan Feters, in the presence of Phoenix general manager Lawrence Marvin. However, this allegation is legally flawed.

The complaint does not allege, there has been no admission by the Respondent, and no evidence has been offered for the purpose of establishing that either Feters or Marvin are supervisors or agents of the Respondent as defined by the Act. Without any allegation and evidence that these two individuals were either agents or supervisors of the Respondent, their conduct, even if it could be considered interrogation of the Charging Party, would not bind the Respondent.

In any event, I agree with counsel for the Respondent's argument as set forth in his post-hearing brief that any incident that occurred on June 22, 2009, would be time barred by Section 10(b) of the Act. See *United Kiser Services, LLC*, 355 NLRB No. 55 (2010). The unfair labor practice charge in this case was filed by McCullough on February 5, 2010, and, therefore, an incident occurring on June 22, 2009, took place more than six months prior to the filing of the charge. Accordingly, since under Section 10(b) of the Act, the charge would be untimely so far as the June 22 incident, I hereby recommend that complaint paragraph 4(k) be dismissed.

3. The Termination of Sandra McCullough

a. The Protected Concerted Activity

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...” Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001); *Meyers Industries*, 268 NLRB 493, 497 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975).

The Board, with court approval, has construed the term “concerted activities” to include “those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries, Inc.*, 281 NLRB 882 (1986), affirmed, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (observing that “a conversation may constitute a concerted activity although it involves only a speaker and a listener” if “it was engaged in with the object of initiating or inducing or preparing for group action or...it had some relation to group action in the interest of employees”). See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board’s power to protect certain individual activities and citing as an example “the lone employee” who “intends to induce group activity”).

In the matter before me, there is no doubt that McCullough was engaged in protected concerted activity. Around mid-May of 2009, McCullough called Charles Sartorius in human resources and said that she wanted to make a complaint about the working atmosphere in Phoenix being extremely hostile and intimidating, with management exhibiting favoritism among employees. It is undisputed that McCullough had for some time been concerned with certain working conditions and the way employees were treated by managers. She had previously had numerous discussions with coworkers about these matters. McCullough and fellow employees Debbie Ruscher, Colleen Bender, Bobbi Lewison, and Jolie Davis discussed their concerns about what they felt was the unfair discharge of a coworker, Marianne Culpepper, and other such conversations followed.

On June 12, McCullough and several coworkers, including Ruscher, Brian Coberly, Kristen Cortelyou, Kaitlin Hamilton, and Brianne Flake, met at an Applebee’s restaurant to discuss certain concerns about management, including the allegation that Hamilton was being sexually harassed by supervisor Justin Bozarth. McCullough helped Hamilton prepare a sexual harassment complaint against Bozarth, and verbally complained about this matter to Brandi Andrews in the human resources department. Around June 22, McCullough complained to Andrews about harassment she was allegedly receiving from managers in Phoenix as retaliating for having previously made complaints.

Because she did not feel that Andrews and human resources were doing enough, fast enough to investigate the complaints that she had raised, she sent a long, very detailed email message to Dianne Gunn, the assistant vice president for national logistics, dated June 29. In her message, the Charging Party raised a whole host of issues and complaints, including:

demurrage, hostility and negativity by managers, male employees being favored, employees abusing the Respondent's policy on emails and IMs, verbal abuse of employees, firing employees for complaining about offensive instant messages, high turnover of temporary employees, and the generally hostile environment that existed in the Phoenix facility. Clearly, the trust of the message was that the Phoenix facility was very poorly run, with a myriad of serious problems.

Management apparently thought McCullough's complaints serious enough to warrant a trip to Phoenix by Gunn on July 2 to investigate these issues. Subsequently, complaints against McCullough by fellow employees required a follow-up trip by both Gunn and Andrews on July 23 and 24, and the investigation ultimately culminated in McCullough's discharge.

In any event, there can be no doubt that from at least May through July of 2009, McCullough was engaged in significant concerted activity with numerous fellow employees, as well as through direct contacts with management on behalf of both herself and fellow employees where she complained about the working conditions at the Phoenix facility. In his post-hearing brief, counsel for the Respondent does take the position that McCullough's actions were purely personal, and that the Respondent had no knowledge of any concerted activity. However, the evidence of concerted activity and the Respondent's knowledge of that activity is so obvious that I find it difficult to believe that counsel is offering a serious denial. Regardless, the Respondent does vigorously deny that it took any adverse action against McCullough because of any concerted activity in which she may have engaged. This is the gravamen of the case.

b. Analysis of the Termination

McCullough was employed by the Respondent for approximately five years. The Respondent does not contend that for most of that period of time McCullough's work performance was unsatisfactory. It was only in the last two months of McCullough's employment that the Respondent claims her conduct was so egregious as to warrant her termination. Of course, the General Counsel contends that McCullough was not terminated for any work related deficiencies, but, rather, because she engaged in protected concerted activity. Accordingly, it is necessary for me to determine the Respondent's true motivation in discharging McCullough.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a *prima facie* showing that McCullough's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. In *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the

General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.¹³ To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280, fn.12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communication between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems*, 337 NLRB 510 (2002); citing *Container Corporation of America*, 244 NLRB 318, 322 (1979).

As I have already found, there is no doubt that McCullough was engaged in protected concerted activity. She had numerous discussions with significant numbers of fellow employees about concerns with their working conditions. At least several of these discussions occurred in group meetings, with one specifically held at Applebee's restaurant. She helped a coworker prepare a sexual harassment complaint against a supervisor. Most significant, she complained about her working conditions and those of fellow employees to Charles Sartorius, human resources manager, Brandi Andrews, assistant human resources manager, and Dianne Gunn, assistant vice president for national logistics.

The many conversations that McCullough had with fellow employees and with managers regarding working conditions, beyond question constituted protected concerted activity. See *Champion Home Builders Co.*, 343 NLRB 671, 680 (2004). Further, there is no doubt that management officials at the corporate level, specifically Sartorius, Andrews, and Gunn, were aware of that activity as McCullough directly communicated with each of them regarding what she perceived to be poor working conditions at the Phoenix facility that were so bad as to constitute a "hostile work environment." She related to them a myriad of complaints, including alleged preferential treatment towards male employees, sexual harassment, and managers addressing employees in a disdainful and disrespectful manner. Not only were the corporate managers acutely aware of her complaints, but they addressed them, with Gunn making a special trip to Phoenix on July 2 to meet with McCullough and look into her complaints. Management's knowledge of McCullough's concerted activity cannot be seriously denied.

Obviously, the discharge of McCullough on August 5 constituted an adverse employment action. But, was the discharge retaliation for McCullough's protected concerted activities? I believe that in part it was. McCullough's protected activity was a "motivating factor" in the Respondent's decision to fire her.

In Gunn's internal document entitled "Termination of Sandra McCullough-Phoenix RCSC Inbound Customer Service Representative" dated August 4 and signed off on by her superiors, Gunn listed the reasons for terminating McCullough, one of which reads, "Divulging of

¹³ More recently, the Board has indicated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.*, 352 NLRB No. 103, fn.5 (2008); citing *Gelita USA, Inc.*, 352 NLRB 406, 407, fn.2 (2008); *SFO Good-Nite Inn, L.L.C.*, 352 NLRB 268, 269 (2008).

confidential information to unrelated employees/parties.” (G.C. Ex. 2.) This conduct concerned McCullough’s habit of “blind carbon copying” to fellow employees those documents that the Respondent considered confidential, such as emails regarding the investigation into allegations of sexual and other types of harassment.

As noted earlier in this decision, I have found that the provision in the Respondent’s employee handbook entitled “Employee Conduct,” which reads in part, “Complaining to your fellow employees will not resolve problems,” constitutes an unlawful attempt to restrict its employees into making complaints only to employees’ immediate supervisors or to human resources personnel, and not to coworkers. I concluded that such language is on its face unlawful, as an attempt to restrain employees from engaging in protected concerted activity by discussing among themselves complaints regarding their wages, hours and working conditions.

Further, I also found that the Respondent’s routine practice of orally admonishing employees involved in investigations not to disclose such information to fellow employees to constitute an unlawful attempt to restrain such employees from engaging in concerted discussions with coworkers about their work related concerns. As I concluded above, such written and oral restrictions on the right of employees to engage in Section 7 activity constitute violations of Section 8(a)(1) of the Act. They also establish animus by the Respondent’s managers towards any employees who would have the temerity to ignore such rules and engage in concerted activity.

In my view, such animus was directed towards McCullough by Gunn when she decided to fire McCullough, in part, because McCullough had been active over the past two months in discussing with fellow employees matters of joint concern regarding their working conditions, and by “blind copying” certain fellow employees with correspondence sent to the Respondent’s managers regarding work related investigations, which the Respondent considered “confidential.” Certainly, the Respondent’s supervisors, Gunn and Andrews, had direct knowledge that McCullough had violated these rules on numerous recent occasions, not the least of which was McCullough’s discussions with and assistance to Kaitlan Hamilton in filing her sexual harassment complaint against supervisor Justin Bozarth. The Respondent’s presumed unhappiness with McCullough’s disregard for its written and oral rules was, I believe, at least a “motivating factor” in Gunn’s decision to terminate her. While it may not be essential to establish, as an independent element, a direct link or nexus between the protected concerted activities engaged in by McCullough and her discharge, I believe that counsel for the General Counsel has done so by showing animus.

Having found that the General Counsel has established a *prima facie* case that the Respondent was motivated to discharge McCullough, as least in part, because of her protected concerted activity,¹⁴ the burden now shifts to the Respondent to show that it would have taken

¹⁴ As an alternate theory, counsel for the General Counsel argues that the evidence also establishes that the Respondent discharged McCullough because she violated the Respondent’s unlawful written and oral rules prohibiting employees from talking about terms and conditions of employment with other employees. It is not feasible to separate such alleged conduct from what, I have concluded was the Respondent’s obvious discrimination based on McCullough’s having engaged in protected concerted activity. Both theories are premised on the same set of facts. As I have concluded that the evidence establishes that the Respondent’s action in discharging McCullough was motivated, at least in part, because of her concerted activity, it is unnecessary to address the General Counsel’s alternate theory of the case, and I will, therefore, not further do so.

the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.*, 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

McCullough was far from a model employee. She had serious relationship problems with coworkers that adversely affected those employees' work environment. She was also deceptive in her dealings with corporate managers. Finally, there was some limited evidence that she had used illegal drugs while at work. These serious deficiencies would have resulted in her discharge, even absent the Charging Parties protected concerted activity.

Further, I find McCullough a less than credible witness. In material ways, her testimony was at variance with coworkers Julie Kersey, Joanne Cassidy, Kaitlan Hamilton, and Kristen Cortelyou, and with managers Brandi Andrews and Dianne Gunn. Her testimony was confusing, seemed uncertain regarding significant issues, and was generally hostile towards management and various fellow employees. McCullough's testimony displayed a superficial attitude of innocent indignation and generosity, while she portrayed other employees as harboring selfish personal animosity towards her. The dislike that she displayed towards her managers was palpable. She displayed histrionics and a willingness to distort the facts in an attempt to place her conduct in the best possible light. I was simply left with the impression that she was willing to say whatever was necessary to prevail. Finding McCullough generally incredible, I will credit other witnesses when their testimony is at variance with hers.

McCullough's personal relationships at work were mercurial and volatile. She seemed to enjoy antagonizing coworkers, and, frankly, she displayed a mean streak. She could be highly caustic in her comments to other employees. As I discussed in the fact section of this decision, on July 22, she sent an email to a number of fellow employees suggesting that Julie Kersey had lied about being home recuperating from an illness, and instead had been partying in Las Vegas. While McCullough attempts to portray this incident as nothing more than a joke played on a friend, Kersey did not view it that way. Kersey felt that her honesty and integrity were under attack, complained to her supervisor, and asked to file a formal complaint against McCullough. Kersey informed her manager that McCullough had created a "work environment [that] has become very hostile."

At about the same time, McCullough saw supervisor Joanne Cassidy wearing a new sweater and commented to her, "Wow, you have massive boobs." According to McCullough, Cassidy was also a friend, and she intended the comment as a complement. Cassidy did not view the comment that way, and immediately complained to Brandi Andrews in human resources.

As insensitive as were McCullough's comments to Cassidy and Kersey, they pale by comparison with her conduct towards Kaitlan Hamilton and Kristin Cortelyou. These two women were also apparently friends of McCullough at one time. That friendship ended when they were not as enthusiastic as McCullough in pursuing complaints against local Phoenix facility management, including a sexual harassment complaint against Justin Bozarth.

McCullough, as a favor to Cortelyou, had previously co-signed her apartment lease. However, after her falling out with Cortelyou and Hamilton, who was an apartment mate with Cortelyou, McCullough informed the two women that Hamilton would need to vacate the apartment as McCullough either wanted to move in herself or be removed as co-signer. From the testimony of the various witnesses, it is clear that McCullough had no real need or intention of moving into the apartment and no real immediate need to be removed as co-signer.

McCullough was merely using the apartment as a means of harassing Cortelyou and Hamilton because, in her view, they had not aggressively pursued complaints against the Phoenix facility managers. McCullough also left voice messages on Cortelyou's cell phone regarding the apartment, which Cortelyou considered further harassment.

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McCullough's conduct regarding the apartment might not have become a work issue if McCullough had confined her actions to after work hours. However, in mid-July, McCullough, who did not have a key to the apartment, managed to convince the apartment manager to let her and her boyfriend into the apartment. Both Cortelyou and Hamilton were still at work when they received a call from McCullough informing them that she was in their apartment. This call was obviously intended to upset the two women, which it did. They immediately informed Phoenix facility general manager Lawrence Marvin of what had transpired. He advised them to call the police, and allowed them to leave work early so that they could attend to the uninvited presence of McCullough and her boyfriend in their apartment. At that point, this personal issue had clearly become a work related issue, since it had adversely affected the work performance of Cortelyou and Hamilton. Both women subsequently informed management that McCullough was creating a hostile work environment for them, and they filed a formal complaint against her.

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One way or another, the complaints about McCullough from Kersey, Cassidy, Hamilton, and Cortelyou had all made their way to Gunn and Andrews. On July 23 and 24, both Gunn and Andrews were in Phoenix to investigate these collective complaints. But in addition, certain issues regarding McCullough's work performance had surfaced. Among others, whether McCullough had paid a customer's demurrage fee.

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Earlier in this decision, I discussed at length the issue of McCullough having paid a customer's demurrage fee. Why she did this remains a mystery, with her explanation that it was "To prove a point" remaining highly cryptic. The Respondent's managers were similarly puzzled by McCullough's actions, as indicated by Gunn who testified that to her knowledge no employee had ever previously done so. Although McCullough's conduct was clearly unusual, the undersigned asked Gunn whether there was something inherently improper about it. She indicated that paying the customer's demurrage fee would give the appearance that McCullough had some kind of inappropriate relationship with the customer, and that a conflict of interest might exist.

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In any event, it was not so much McCullough's payment of the demurrage fee that the Respondent found egregious, but, rather, the attempt to conceal it. Much time and testimony was taken at the hearing trying to resolve the question of whether McCullough lied to Gunn and Andrews in late July about who was to receive the \$120 demurrage refund. Gunn and Andrews testified that McCullough untruthfully told them it was for the customer, which McCullough denies directly saying. I am of the view that it does not really matter, and I am willing to give McCullough the benefit of the doubt and conclude that she never actually said the refund was for the customer. However, clearly that is what she initially implied.

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While McCullough wrote her personal check for the demurrage fee, which she submitted to Derrick Vincent Moore, supervisor in billings and corrections, she did not thereafter let her Phoenix facility managers, corporate human resource managers, Andrews, or Gunn know that the refund of the demurrage charges were intended for her. The Respondent had every reason to assume that as in the normal course of business, the refund that she was seeking would be on behalf of the customer and would be paid to the customer. McCullough rather deliberately neglected to mention that she had paid the demurrage fee herself and, so, the refund would be going to her. In this way, she was certainly being deceptive.

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Of course, by the time of their meetings on July 23 and 24, Andrews and Gunn were aware of what had transpired, and, so, the check Gunn carried with her was made payable to McCullough. Gunn proceed to give the check to McCullough, showing that she was aware McCullough had paid the demurrage fee and the refund was for her. Again, while McCullough may not have directly lied to Gunn about the refund, it is obvious that she was intentionally trying not to disclose to Gunn that the refund was for her. Only when confronted with the check did she make that admission. In my opinion, Gunn certainly had reason to conclude that McCullough was being deceptive.

As discussed above, it was during Gunn's and Andrew's investigation on July 23 and 24 that those managers learned about alleged illegal drug use at work by McCullough. Although a number of employees had allegedly mentioned McCullough's use of marijuana, only one employee, Kaitlin Hamilton, ultimately testified at the hearing about actually seeing McCullough use drugs while at work. According to Hamilton, on June 16 she observed McCullough smoking marijuana in the company parking garage during a work break. Kristen Cortelyou testified that while she never actually saw McCullough using drugs at work that McCullough had told her that she frequently used marijuana during her lunch break while at work. McCullough denied ever using drugs at work, although she testified about some past recreational use of marijuana away from work.

I do not have to resolve credibility in this instance. Whether McCullough ever actually used marijuana at work or not, is really not relevant. What matters is whether Gunn and Andrews were told that she used drugs while at work, and whether that allegation seemed credible. It is clear to me that they were so told, at least by Hamilton, and assumed it to be true. They obviously did not credit McCullough's denial, especially in light of her deception in the demurrage matter. The combination of McCullough's work related conflicts with employees Kersey, Cassidy, Hamilton, and Cortelyou, her deceptive conduct regarding the demurrage refund, and her alleged drug use at work were, in my view, a sufficient basis upon which to terminate McCullough's employment, even in the absence of her concerted activity.

Counsel for the General Counsel argues in her post-hearing brief that the Respondent did not conduct a valid investigation in connection with McCullough's complaints, and, rather, conducted a "witch hunt" in connection with the complaints made against her. The term "witch hunt" would denote an investigation devoid of any finding of actual wrong doing. How can that be when the investigation disclosed separate legitimate complaints against the Charging Party by employees Kersey, Cassidy, Hamilton, and Cortelyou, as well as evidence of an obvious deception in connection with the demurrage refund, and a drug allegation, which at least had the appearance of credibility? McCullough's "soap opera" like relationships with fellow employees were causing a disruptive environment at work. She was deceptive in her dealings with management. There was at least some evidence that she was abusing drugs while at work. All of these issues surfaced in approximately a 30 day period in or about July. Collectively, they were certainly sufficient to result in McCullough's discharge, irrespective of her protected activity.¹⁵

¹⁵ While counsel for the General Counsel questions the Respondent's failure to act on a formal complaint filed by McCullough on August 4 against Cortelyou and Hamilton, I find it rather obvious that no action was taken as a decision had already been made by Gunn to fire McCullough. It was the very next day that Gunn arrived in Phoenix for the explicit purpose of terminating the Charging Party.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that McCullough was terminated for cause. As such, the Respondent has rebutted the General Counsel's *prima facie* case and shown that it would have discharged McCullough even in the absence of her having engaged in protected concerted activity. Therefore, I shall recommend that complaint paragraphs 4(h), (i), (j), and 5, but only as it relates to McCullough's discharge, be dismissed.

Conclusions of Law

1. The Respondent, Hyundai America Shipping Agency, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Maintaining or enforcing a provision in its Employee Handbook under the heading Electronic Communications and Information Systems, which in part contains the following language: "Finally, employees should only disclose information or messages from these [sic] systems to authorized persons";

(b) Maintaining or enforcing a provision in its Employee Handbook under the heading Personnel Files, which in part contains the following language: "Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge";

(c) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language: "Voice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all";

(d) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "14....indulging in harmful gossip";

(e) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "16. Performing activities other than Company work during working hours";

(f) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "21....exhibiting a negative attitude toward or losing interest in your work assignment"; and

(g) Promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I concluded that various provisions in the Respondent's Employee Handbook are unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rules, and advise its employees in writing that said rules have been so revised or rescinded.

Further, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.¹⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Hyundai America Shipping Agency, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing a provision in its Employee Handbook under the heading Electronic Communications and Information Systems, which in part contains the following language: "Finally, employees should only disclose information or messages from these [sic] systems to authorized persons";

(b) Maintaining or enforcing a provision in its Employee Handbook under the heading Personnel Files, which in part contains the following language: "Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge";

(c) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language: "Voice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all";

¹⁶ Both in the complaint and in counsel's post-hearing brief, the General Counsel requests that any notice to employees be posted via the Respondent's intranet, email, or other electronic posting procedures. However, counsel offers no argument or evidence as to why such an extraordinary remedy is necessary in this case. In the absence of any such evidence, I am declining to order notice posting other than in the traditional method. There is no reason to conclude that the Respondent's Phoenix facility employees will not have access to a posted notice, which the Board has traditionally held is sufficient to assure those employees that the Respondent will respect their rights under the Act.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “14....indulging in harmful gossip”;

5 (e) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “16. Performing activities other than Company work during working hours”;

10 (f) Maintaining or enforcing a provision in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “21....exhibiting a negative attitude toward or losing interest in your work assignment”;

15 (g) Promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department; and

(h) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

20 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Electronic Communications and Information Systems, which in part contains the following language: “Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons”;

30 (b) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Personnel Files, which in part contains the following language: “Any unauthorized disclosure of information from an employee’s personnel file is a ground for discipline, including discharge”;

35 (c) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Employee Conduct, which in part contains the following language: “Voice your complaints directly to your immediate superior or to Human Resources through our ‘open door’ policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all”;

40 (d) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “14....indulging in harmful gossip”;

45 (e) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “16. Performing activities other than Company work during working hours”; and

50 (f) Within 14 days of the Board’s Order, revise or rescind the rules in its Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: “21....exhibiting a negative attitude towards or losing interest in your work assignment.”

(g) Within 14 days after service by the Region, post at its Phoenix facility, located in Scottsdale, Arizona, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.¹⁹ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Phoenix facility at any time since August 5, 2009; and

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. on October 18, 2010

Gregory Z. Meyerson
Administrative Law Judge

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁹ Counsel for the General Counsel did not request that copies of the attached notice be posted at any other of the Respondent's facilities. Her post-hearing brief merely requested that the Respondent "post an appropriate Notice to Employees." Further, no evidence was offered at the hearing regarding whether the Respondent's unlawful Employee Handbook provisions or unlawful oral rules were disseminated or promulgated at any of the Respondent's facilities, other than the Phoenix facility. Accordingly, I have ordered that the notice be posted only at the Phoenix facility.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including complaints regarding various forms of harassment.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Electronic Communication and Information Systems, which in part contains the following language: "Finally, employees should only disclose information or messages from these [sic] systems to authorized persons."

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Personnel Files, which in part contain the following language: "Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge."

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Employee Conduct, which in part contains the following language: "Voice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all."

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "14....indulging in harmful gossip."

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "16. Performing activities other than Company work during working hours."

WE WILL NOT maintain or enforce a provision in our Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "21....exhibiting a negative attitude toward or losing interest in your work assignment."

WE WILL NOT prohibit you from discussing with other persons matters under investigation by our human resources department.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL revise or rescind the rules contained in our Employee Handbook under the heading Electronic Communications and Information Systems, which in part contains the following language: "Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons."

WE WILL revise or rescind the rules contained in our Employee Handbook under the heading Personnel Files, which in part contains the following language: "Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge."

WE WILL revise or rescind the rules contained in our Employee Handbook under the heading Employee Conduct, which in part contains the following language: "Voice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all."

WE WILL revise or rescind the rules contained in our Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "14....indulging in harmful gossip."

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WE WILL revise or rescind the rules contained in our Employee Handbook under the heading Employee Conduct, which in part contains the following language threatening disciplinary action for: "21....exhibiting a negative attitude toward or losing interest in your work assignment."

HYUNDAI AMERICA SHIPPING AGENCY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 602-640-2146.